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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-223

CENTRAL HARDWARE COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

RETAIL CLERKS UNION, LOCAL 725, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Intervenor.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS

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OPINIONS BELOW

The divided opinion of the Eighth Circuit Court of Appeals is reported at 439 F.2d 1321 and is printed in the Appendix at p. 74. The Decision and Order of the National Labor Relations Board (hereafter "the Board") are reported at 181 N.L.R.B. No. 74, and is printed in the Appendix at p. 65. The Trial Examiner's Opinion is unreported and is printed in the Appendix at p. 17.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1971, rehearing denied on April 26, 1971. The Petition for Certiorari was filed within 90 days of the latter date and was granted on January 10, 1972. This Court's jurisdiction is invoked under 28 U.S.C., § 1254 (1).

QUESTIONS PRESENTED

1. Whether, and to what extent the Supreme Court's decision in *Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968) abrogates this Court's rule in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) in the instance where union organizers come onto the parking lot of a single free-standing retail store for the sole purpose of conducting an organizational campaign, notwithstanding that (1) there are effective alternate means available to present the union's organizing message to the employees, (2) the union organizer's conduct while on the parking lot was abusive, coercive and objected to by many employees, and (3) the parking lot is owned and maintained solely by the owner and closely regulated so as to insure use solely by its customers and employees.

2. Whether the Court of Appeals for the Eighth Circuit erred in applying this Court's rule in *Logan Valley* rather than this Court's rule in *Babcock & Wilcox* in declaring petitioner's action of barring non-employee union organizers from soliciting petitioner's employees on its parking lot, violative of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C., Sec. 158.

3. May the owner of a free-standing store with its own adjacent parking lot be compelled to allow non-employee union organizers' unrestricted access to said parking lot

to present an organizational message to the owner's employees notwithstanding that (1) there are effective alternative means available to present the union's organizing message to the employees, (2) the union organizers' conduct while on the parking lot was abusive, coercive and objected to by many employees, and (3) the parking lot is owned and maintained solely by the owner and closely regulated so as to insure use solely by its customers and employees.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves Sec. 7 and 8 of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 et seq. (hereafter "the Act"); the First and Fifth Amendments to the United States Constitution. These are reprinted in the pertinent parts in the Appendix at p. 90.

STATEMENT OF THE CASE

At the end of 1968, Central operated ten retail hardware stores, two of which were in Indianapolis, Indiana, and eight of which were in the St. Louis, Missouri, area.* The executive offices of Central were located at 4200 North Union Boulevard in St. Louis.

In early 1968, after some market research, Central decided to open two retail stores in Indianapolis, Indiana. The stores were designated as the East Store and the West Store. The criteria for the store locations were that the buildings be of the 70,000 square foot variety with adequate parking facilities and, additionally, be free-

* Central currently operates 20 retail stores, 10 in the St. Louis, Missouri area, 3 in Illinois, 4 in Indiana and 3 in California.

standing units that do not depend on traffic that is attracted by any other establishment (App. p. 221).

Each Indianapolis store has a parking lot adjacent to the building and the use of this lot is limited to Central's invited customers. Each lot can be entered from at least two streets at distinct entry points. Each entry point to the lots is separated from the traveled portion of the highway by level grassy areas which are on public property (App. p. 206). The record shows that a union organizer could safely stand in those areas and offer union literature to employees entering or leaving Central's parking lots (App. p. 207).

The stores and lots are leased by Central from an individual who does not own or lease any other lots or stores in the area to others. The lots are maintained by Central solely for its customers and employees. Central repairs, insures and maintains its own lots exclusively. There are no physical attributes of Central's premises and the stores down the road which would evidence a shopping center. There are some other business establishments in the area of Central's stores, but all of them are small, on different parcels of land owned by others, and have their own lots which handle their own store's customers.

The East Store (plot plan at App. p. 239) abuts a fenced-off car wash and an entrance road passes by a one-tenant construction office. The West Store (plot plan at App. p. 238) abuts a carpet shop, a small loan company, and, distantly, a McDonald's hamburger shop. The small loan company usually has no more than one or two customers at a time and the carpet shop usually has no more than four customers at a time. Although there are commercial enterprises including shopping centers near each Central store, all of these establishments, other than those shown on the two plot plans, are separated from Central by highways carrying extremely heavy traffic (App. pp. 244-250).

Central's two Indianapolis stores opened for business on June 3, 1968, although Central took physical possession of the buildings on April 15, 1968. Approximately 250 to 300 employees were initially hired from the Indianapolis area. The majority of these employees live within five miles of the store where they work and 75% live within ten miles (App. pp. 134-135).

One of the new employees hired in April, 1968, as a full-time paint department employee was Mr. Edward Stahl, Jr., who, unknown to Central, had taken a year's leave of absence from his job with The Kroger Company that same month in order to work full time for the Union in organizing Central's stores (App. p. 204). All the time he worked for Central, he was also being paid a salary as a full-time employee of the Union, and was active on Central's time and pay in bringing the Union's organizing message to Central's employees (App. p. 169). He was instrumental in supplying a list of the employees, complete with addresses and job descriptions to the Union organizers. Subsequently, he became one of the two principal non-employee organizers and the chief complaining party of the Union's charges against Central.

On about May 21, 1968, the Union began an organizational campaign at both stores. The campaign took place primarily on Central's parking lots with some 9 or 10 Union organizers (organizers who were not employees) conducting a campaign, consisting mainly of confrontation and argumentation, to get signed authorization cards to establish the Union as the bargaining agent for the employees of both stores. No picketing or carrying of signs or placards was involved. However, handbills were passed out and placed on employees' automobiles.

While the campaign was under way, the Union was supplied with employees' names, addresses, telephone numbers and job descriptions by Mr. Stahl and other employees interested in the Union (App. pp. 204-205). They

were so successful in gathering information by these means that by July 22, 1968, the Union's list of employees' names and addresses was 80% complete (App. p. 196), and the Union did not even ask Central for a list of employees' names and addresses (App. p. 205).

On July 22, 1968, the Union's Director of Organizing provided two of the Union organizers with a list of Central's employees, complete with addresses, phone numbers and job descriptions from which they made 50 to 60 house calls that day. The farthest distance they traveled from either Central store was 15 or 16 miles and the average home was about 5 miles from the store. Although they had not called in advance to make an appointment with any of the employees (a method characterized by the Board as a "cold call"), they were successful in talking to as many as 10 employees on the list (App. pp. 98-99, 102-103). There was no testimony offered by the Board that any other house calling was done by Union organizers during the campaign.

In the first month of the campaign, between May 21, 1968, and June 24, 1968, the Union received 92 signed authorization cards. During the next three weeks from June 24, 1968, to July 15, 1968, the Union only received 17 signed authorizaton cards. The reason given by the Union for the sudden drop after June 24 is that the organizers from outside the Indianapolis area had to move on to other area international elections and the six Indianapolis organizers had to perform their regular Union functions in connection with stores other than Central's stores (App. p. 204). This left only two Union representatives working on the organization of Central after July 1, 1968, one of whom was Stahl who, in the interim, had been discharged for cause by Central but who continued as a full-time employee of the Union.

Even before the stores opened for business, Central instituted a strict policy of keeping non-customers and non-

employees out of the stores and off the parking lots. This policy was invoked many times by Mr. Max Hagerman, Central's Indianapolis Manager, thereafter: Girl Scouts attempting solicitations for contributions were stopped; two baseball organizations were asked to leave the premises; an attempted sale of magazines was stopped; a request to circulate a petition for a court-martialed soldier was refused; a request to sell Christmas trees on the parking lots was refused; an attempt to operate a photo drive-in and others were all refused (App. pp. 131-132).

Some time near the beginning of June, 1968, numerous employees began approaching Mr. Hagerman with serious complaints concerning certain Union organizing activities on the parking lots. Some 25 to 30 employees approached Mr. Hagerman at various places throughout the stores. Some of them complained about being detained from leaving the lot, some were threatened, and some asked for protection when they left the store at night (App. p. 133).

Other employees complained that Union organizers told them that employees who refused to sign authorization cards would lose their jobs when the Union came in, that dues might be increased, jobs lost, and the initiation fee increased (App. p. 136). Some of the employees even threatened to quit Central's employ unless this type of organizing activity ceased (App. pp. 133, 222).

When the complaints became numerous, Mr. Hagerman asked the employees to put their complaints in writing. He then sent those written complaints (App. pp. 257-260) to Mr. George Reed, Central's Vice President, in St. Louis.

Mr. Reed, himself, had previously received a letter signed by 97 employees out of a total of 125 employees from one of the stores which read:

"George Reed
Director of Stores
St. Louis, Missouri

We, the employees of Central Hardware Post No. 7, do not want the Indianapolis Retail Clerks Union harassing us any more. We do not wish to join this Union. Please do all in your power to stop this annoying of employees" (Emphasis in original) (App. p. 242).

Mr. Reed then presented the letter and written complaints to Mr. Stanley Cohen, Central's President. Mr. Cohen then sent each Indianapolis employee a letter which read:

"Dear Fellow Employee:

I have just finished studying the petition that was given by our Indianapolis people to George Reed enlisting our help in ending the **coercion and harassment** to which they are being exposed.

To these people, first, I must express my deepest appreciation for the trust and confidence in your Company you have expressed by stating you are not interested in joining the Union. This expression of loyalty is very gratifying and is just another bit of proof of the wisdom of our move to Indianapolis.

One step that we are taking immediately, like today, is to instruct our Indianapolis management to keep all Union organizers off our premises, both inside and outside. **This should offer some prompt relief.**

In addition, **we have asked our lawyers to advise what we can legally do to prevent such dastardly actions.** We expect some recommendations shortly and you may rest assured **your Company will do all within its legal power to back you up and prevent any fur-**

ther harassments" (Emphasis supplied) (App. p. 237).

Mr. Cohen's letter was distributed on July 22, 1968. However, the Union organizers from outside the Indianapolis area had departed Indianapolis by June 24, 1968, and the six local organizers had abandoned the campaign in order to perform their regular Union functions by the time the letter was distributed. However, one Union organizer from Columbus, Ohio, was barred from the West Store parking lot as a result of the directive in Mr. Cohen's letter.

At the same time, Central instituted a charge of unfair labor practices against the Union, based on the letter from the employees and their other written complaints (Case No. 25-CB-816). Although the Board refused to act on Central's charge against the Union, it did issue a Complaint against Central based on numerous charges the Union had filed with the Board. A hearing on the Complaint was concluded on February 6, 1969. On the principal issue before this Court, the Board found that in light of the quasi-public nature of Central's parking lots, Central had violated Sec. 8(a) (1) and (3) of the Act by its unlawful rule barring non-employee Union organizers from the parking lots.

ARGUMENT

Distinction between *Babcock* and *Logan Valley* Decisions.

This case squarely faces the issue as to whether this Court's decision in *Logan Valley* has abrogated the clear rule of *Babcock* as that rule pertains to a nonemployee union organizer's entry onto the private parking lot of a single free-standing store for the purpose of conducting a union organizational campaign while, at the same time, ignoring alternate equally effective methods of communicating with the employees.

This Court in its *Babcock* decision, considering the same question as to the rights of nonemployee union organizers to come upon an employer's unfenced parking lot to solicit membership of its employees into a union, established what has been considered the law up until this time. Certiorari was granted in the *Babcock* case because of conflicting decisions in the appellate courts. The Tenth Circuit Court of Appeals had held that a nonemployee could come onto company property **only if** there was a showing that the employees involved were so otherwise inaccessible to the union organizers as to be a handicap to the employees' guaranteed right of self-organization. *NLRB v. Seamprufe, Inc.*, 222 F. 2d 858 (10th Cir. 1960). At approximately the same time, the Sixth Circuit Court of Appeals held, to the contrary, that the barring of union organizers from an employer's property was an "unreasonable impediment of the freedom of communication essential to the exercise of its employees' rights to self-organization". *NLRB v. Ranco, Inc.*, 222 F.2d 543 (6th Cir. 1960).

This conflict of appellate decisions was resolved by the following ruling of this Court in the *Babcock* case:

> . . . (A)n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. 351 U.S. at 112.

The facts and circumstances of the instant case meet the standards set forth in the *Babcock* decision. The majority opinion in the Court of Appeals for the Eighth Circuit indicated by innuendo that there were other reasonable means of communication available to the union to reach the employees, other than by communicating with them on Central's lots. Judge Gibson in his dissent specifically found that such alternate means were, in fact, available (App. p. 89). There was no evidence whatsoever that Central discriminatorily applied its nonemployee no-solicitation rule (App. p. 90).

Therefore, the instant case would have been resolved in Central's favor had the Court of Appeals for the Eighth Circuit not felt **required** under the *Logan Valley* decision of this Court to decide otherwise. The exact words of the majority decision establishes this fact: "Under the **mandate** of *Logan Valley Plaza,* we hold . . ." (App. p. 84) (emphasis supplied).

The decision on appeal here established, in effect, that the *Babcock* rule has been modified and/or abrogated by *Logan Valley* to the extent that union organizers now have free access to **any** employer's premises that are "quasi-public" in character without regard to the standards set by the *Babcock* decision. The Court of Appeals below held that, "The essential distinction between *Babcock* and *Logan Valley Plaza* rests upon a determination as to the **use** of the properties in question" (App. p. 84) (emphasis supplied). It then decided Central Hardware's parking lots to be generally open to the public and therefore "quasi-

public" in status. The majority decision, then, equated the solicitation by nonemployee union organizers to peaceful picketing under the First Amendment. Under these circumstances, the Court of Appeals below found that *Logan Valley* is the binding precedent, *not Babcock* (App. p. 84).

It is Central's contention that the majority opinion is an incorrect application of this Court's *Logan Valley* decision. Judge Gibson, in his dissent, grasped the distinction of these two cases and points out: "This is a critical distinction which the majority fails to discuss" (App. p. 87). There is no conflict between *Babcock* and *Logan Valley*. The use of the respective properties is not the essential distinction between the two cases. The essential distinction between the two cases lies in: (1) the persons to whom the union organizer intends to communicate his message, and; (2) the Law which affords him the legal right to communicate that message in the place he has chosen.

In *Logan Valley*, this Court found that the message to be communicated was directed to the **public at large** (see footnote No. 9, 391 U.S. at 320) and, of necessity, was required to be communicated on Logan Valley Plaza's parking lot since this was the *only* place where patrons of Weis Market could be found. In addition, this Court decided that the Logan Valley Plaza parking lot had attained a quasi-public status due to its "functional equivalent of a 'business block' and **for First Amendment** purposes must be treated substantially in the same manner", id., 391 U.S. at 325. The case was tried on Constitutional issues involving a picket's rights of free speech under the First Amendment and the **right to picket** was upheld.

The message in *Babcock*, however, involved, not a message to the general public, but rather a personal solicitation from a union organizer directed to a well-defined and

accessible group of Babcock & Wilcox Co. employees. In determining this union organizer's rights to physically enter upon the Babcock & Wilcox parking lot this Court held that the union organizers had no lawful right to go onto that parking lot since those employees could reasonably be contacted elsewhere. Consequently, the employer was held to be within his legal rights in barring the organizers from the lot.

Babcock, unlike *Logan Valley*, was tried, not on a First Amendment Constitutional question, but on the balancing of employee's statutory rights of self-organization under Section 7 of the NLRA against the employer's right to his private property under the Fifth Amendment. The specific balancing was clearly set out:

> "Organization rights (referring to Section 7 of the NLRB) are granted to workers by the same authority, the National Government, that preserves property rights (referring to the Fifth Amendment). Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization." 351 U.S. at 112 (explanation supplied).

The *Logan Valley* decision relied heavily on *Marsh v. Alabama*, 326 U.S. 105 (1946), a case involving a Jehovah's Witness seeking to distribute leaflets to the general public on the streets of Chickasaw, Alabama, a company town. To rely on *Marsh* in *Logan Valley* was natural, since both cases involved persons seeking to communicate with the **general public** in places generally open to the public at large without limitation, and both cases were decided on the basis of First Amendment rights.

However, *Logan Valley* neither mentioned nor alluded to *Babcock* (earlier decided) nor, in turn, did *Babcock*

mention nor allude to *Marsh* (much earlier decided) although all three cases deal with the same basic issue, trespass on private property for the purposes of communicating a message. This is not surprising since each line of cases (*Logan Valley* and *Marsh* on the one hand and *Babcock* on the other hand) deals with a different question concerning communication rights with a different applicable rule of law. As set forth above, "This is a critical distinction which the majority fails to discuss" in the instant case.

Central's employees were known to the union, were readily identifiable and were available to the union organizers away from Central's parking lots. Central was not charged with violating a nonemployee union organizer's First Amendment, free speech rights, but rather, the charges were, as they should be, confined to violations of the employee's statutory rights under Section 7 of the NLRA. This was exactly the situation in *Babcock* where this Court balanced the employees' Sec. 7 rights against the employer's Fifth Amendment right without reference to the First Amendment.

Likewise, Mr. Justice Black pointed out in his *Logan Valley* dissent, the *Logan Valley* majority opinion did not reach any issue under the NLRA, id., 391 U.S. at 329. Mr. Justice White in his dissent even went further in pointing out that Congress did not think it necessary to permit picketing on private property, either to further the national labor policy under the commerce clause or to implement and enforce the First Amendment, id., 391 U.S. at 340. *A fortiori*, in the instant case where the issues have been submitted both to the Board and the Court of Appeals, not on First Amendment rights but on statutory rights, Congress and this Court have heretofore prescribed the conditions upon which Central's property rights must yield to nonemployee union organizers and these conditions do not exist.

In equating NLRA Sec. 7 union solicitation to First Amendment picketing, the Court of Appeals has created a conflict which has heretofore not existed and which was not intended by either the *Logan Valley* or *Babcock* decisions. To correct this conflict Central respectfully requests this Court to reverse the majority decision below by holding Central's nonemployee no-solicitation rule lawful.

Quasi-Public Property

Of equal, or even greater, reason for this Court to reverse the Eighth Circuit decision is that the "quasi-public" characterization attributable to the sidewalks of a company town and the parking lots of a large shopping center (Logan Valley) has now, by the decision in question, been extended to a parking lot owned, maintained, and controlled by a single free-standing retail store for the exclusive use of its customers and employees.

In both *Marsh* and *Logan Valley*, this Court very carefully compared the quasi-public attributes of the properties involved with the attributes of public facilities and functions of a normal city. In *Marsh*, such a comparison was not difficult because Chickasaw, Alabama was, in fact, a city although privately owned by Gulf Shipbuilding Corporation. Chickasaw actually was a suburb in a densely populated section of Mobile, Alabama. To anyone not familiar with property lines, the town could not be distinguished from the surrounding neighborhood since the entire area was thickly settled. It was complete with residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated, id., 326 U.S. at 502.

Of particular interest to the Court was the "business block" in Chickasaw where merchants, service establishments and the U. S. Post Office rented stores and business

places. According to all indications, the residents used the community business block as their regular shopping center. To do so, they had for many years made use of a company-owned paved street and sidewalk located along side the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block led into a four-lane public highway which ran parallel to the business block at a distance of thirty feet. There was nothing to stop highway traffic from coming onto the business block and upon arrival a traveler could make free use of the facilities there. In short, the town and its shopping district were accessible to and freely used by the public in general and there was nothing to distinguish them from any other town and shopping center except the fact that the title to the property belonged to a private corporation, id., 326 U.S. at 503.

Considering all of the attributes of Chickasaw which resemble a normal town as a whole, the Court found that the community "business block" served as the Chickasaw community shopping center and was freely accessible and open to the people in the area and those passing through. Accordingly, it decided that Mrs. Marsh had a greater right under the First Amendment to distribute her leaflets on the quasi-public "business block" than Gulf Shipbuilding Corporation had under its Fifth Amendment right to control its property since Gulf had opened up the "business block" for use by the public in general.

Logan Valley Plaza, however, did not have the almost exact resemblance to a normal city as did Chickasaw. Contrary to the physical layout of Chickasaw, Logan Valley Plaza did not have thoroughfares, residential areas nor normal city facilities. The Court did find, however, that Logan Valley Plaza was a planned development near Altoona, Pennsylvania, containing two substantial commercial establishments with fifteen more scheduled for

opening, all to be operated on a commonly-maintained tract of ground owned by the shopping center developer.

As a portion of the planned shopping center, sidewalks adjoined the buildings in the middle of a mall for the use of pedestrians going to and from their cars and from building to building. There were clearly marked out roadways in the parking areas for the use of vehicular traffic entering and leaving the mall. Although there was no finding that Logan Valley Plaza was the community business center of Altoona, the Court did find that Logan Valley Plaza was clearly the functional equivalent of the community business district of Chickasaw involved in *Marsh*.

As it had done in *Marsh*, in comparing Chickasaw to an ordinary city, the Court in *Logan Valley* considered, as a whole, all of the physical characteristics of Logan Valley Plaza which resembled the community business block in *Marsh*. Finding the similarities to be "striking", the Court in *Logan Valley* saw no reason why access to a business district in a company town (*Marsh*) for the purpose of exercising First Amendment rights should be allowed Mrs. Marsh, while pickets' access for the same purpose to a shopping center functioning as a business district (*Logan Valley*) should be limited simply because the property surrounding the shopping center is not owned by the shopping center developer, id., 391 U.S. at 319. Accordingly, the *Logan Valley* decision held that the pickets could go onto Logan Valley Plaza to exercise their First Amendment rights with regard to Weis Market.

In the instant case, the Court of Appeals for the Eighth Circuit, contrary to the procedure followed by this Court in *Marsh* and *Logan Valley*, did not compare the physical characteristics of Central's lots with a normal city or even a community business block. Instead, it upheld the Board's finding that Central's lots are generally open to

the public and therefore have a "quasi-public" status. The Board based its finding by concluding in a footnote that "the complex in which Respondent's (Central's) stores were located contains other business enterprises; that there are no fences or gates around Respondent's parking lots; that Respondent does not station guards there for the purpose of refusing access to anyone; and that there are no signs barring trespassers from its lots" (App. p. 68).

The Board made only a slight comparison between Central's lots and the *Logan Valley* shopping center. No comparison with a *Marsh* type company town was made. Instead, the Board adopted the Trial Examiner's Decision (App. p. 66) which relied heavily on *Solo Cup Co.*, 172 NLRB No. 110 (1968) and, only secondarily, on *Logan Valley*. The Trial Examiner devoted five pages of his decision to discussing and comparing *Solo Cup* to *Logan Valley* and then summarily dealt, in four lines, with the physical characteristics of Central's stores, after evidence of such characteristics had covered a substantial portion of the 1049 page trial transcript. His sole evaluation of Central's lots was:

> "The parking lots here (Central's) like the premises in *Solo Cup* are accessible to the public without limitation. Also like the property in *Solo Cup*, the parking lots are unfenced, unguarded and there are no posted signs barring anyone from the lots.
>
> Accordingly, as the Board did in *Solo Cup*, I find Respondent's (Central's) parking lots have a quasi-public status" (App. p. 43).

The Board issued its Decision (App. p. 65), adopting the Trial Examiner's decision on this point, on March 4, 1970. However, one week later, on March 11, 1970, the Seventh Circuit Court of Appeals reversed the Board's

Solo Cup decision, *N.L.R.B. v. Solo Cup Co.*, 422 F. 2d 1149 (7th Cir. 1970). In reversing this same "quasi-public" theory, the Court of Appeals for the Seventh Circuit held that merely resembling a municipal district of a city was not enough to make Solo Cup's Calument Industrial District a "quasi-public" place. It held that:

> "The Board's conclusion that Calumet Industrial District is a quasi-public place . . . is not supported by substantial evidence. While there were **no fences** surrounding the area and **no guards** posted at the entrance to the District, the District was still private property and not open to public use" (emphasis added) (supra at 1151).

Both the Board and the Trial Examiner relied heavily on the fact that there are no fences, barriers, guards or signs barring anyone from using Central's parking lots. However, the parking lot in *Babcock* was not fenced, nor is there any evidence in either the Supreme Court decision or the Board's own decision (109 NLRB No. 82) that the *Babcock* lot had any barriers, guards, or signs barring trespassers.

Since Central, like most other businesses, operates and controls its properties within the protection of state trespass laws, such physical barriers are obviously not necessary. The Board cannot present one case which stands for the rule that private property must be so posted and guarded in order to keep it from becoming part of the public domain.

A close analysis of the evidence and plot plan exhibits (App. pp. 238, 239) of the Central stores clearly shows that there is little or no similarity with the properties in either *Marsh* or *Logan Valley*. Central has not provided any of the city functions found in *Marsh*, nor is there any evidence that the Central lots are the community business

blocks of Indianapolis. Contrary to Chickasaw, nobody would have any difficulty distinguishing Central lots from the public streets and parks of Indianapolis.

Of equal importance, the Central lots totally lack the openness, accessibility and planned one-stop shopping found in *Logan Valley*. Contrary to *Logan Valley*, none of Central's property or parking lots are shared with any other employer, business or facility. The owner of the land where each store is situated does not own any adjoining land. Central is solely responsible for maintaining the lots and solely liable for their operation. No common area fees are paid by anyone, since there are no common occupiers of the lots with Central. Any businesses that are down the street from the stores are very small with their own parking lots.

The correct comparison of Central's stores with a shopping center and the characteristics of a city was set forth in great detail in the expert testimony of witness Eskanazi (App. pp. 210-218). His testimony is unequivocal in distinguishing the Central stores from a *Logan Valley* type development. The Board, however, has characterized the stores as shopping centers because the East store (plot plan at App. p. 239) has a fenced-off car wash and an entrance road passing a one-tenant building and the West store's property line abuts the property line of two or three small businesses which ordinarily have a total of no more than five or six customers at a time. Great emphasis is laid on the presence of other business establishments in the vicinity. However, the evidence is clear that such establishments (other than those shown on the plot plans) are separated from Central by highways with extremely heavy traffic.

In *Marsh*, this Court considered all of the features, taken as a whole, of Chickasaw which resembled an ordi-

nary city before concluding that the business block of Chickasaw should be treated as a public place so far as Mrs. Marsh's First Amendment case was considered. Nothing in *Marsh* indicates that if only one of those features is present, e.g., an unfenced parking lot or nearby businesses, that would be sufficient for the property in question to be "quasi-public."

Likewise, in *Logan Valley*, this Court considered all of the features of a modern shopping center before concluding that Logan Valley Plaza was a quasi-public place for the pickets of Weis Market. Again, as in *Marsh*, there was no indication that any one feature of Logan Valley Plaza made that property quasi-public for First Amendment purposes. However, the instant decision of the Court of Appeals for the Eighth Circuit has extended the classification of "quasi-public" from the sidewalks of a company town and large shopping center to the parking lot of a single free-standing retail store which has practically no features of either a company town or a large shopping center other than being near some other commercial establishments in the same general area and not having a fence or guards around the store and its parking lot. Rather than being unique to a "quasi-public business block", these features are common to practically all commercial establishments and retail stores located in a suburban area. Any service station, hamburger shop, garment cleaner, liquor store, etc. having an unfenced and unguarded parking lot and located in an area where there might by chance be some other small stores, has by the instant decision, now been placed in the same public or quasi-public status as the sidewalks and streets of a city or the expanse of a large shopping center. Surely, this was never the intent of *Marsh*, *Babcock* nor *Logan Valley*.

In selecting the location and opening the East and West stores, Central has done nothing different from the many

commercial establishments that have opened stores in suburban areas with adequate parking for their respective customers. The parking is obviously provided for the convenience of the shopper, not to create a *cordon sanitaire* around the store to immunize the store owner from union organizers. Central's Indianapolis employees were not sealed off in the stores from the union organizers. The evidence clearly shows that they were easily accessible to union organizers in places other than the parking lots during nonworking hours. Consequently, whether or not Central invited customers to come park on its lot while shopping in its store has no real bearing on whether the union organizers should be allowed to use Central's lots to communicate a message of self-organization under Section 7 of the Act to Central's employees.

In addition to allowing union organizers to come onto a free-standing store's parking lot irrespective of any otherwise accessibility to the employees, the decision below has now rendered the store owner powerless to control the activities of the organizers once they arrive.

From the very beginning of the organizational campaign, the union organizers in this case conducted an aggressive and progressively oppressive campaign. The Court of Appeals for the Eighth Circuit characterized it as "a blitz-type campaign" and found that an overwhelming majority of the employees at one store had signed a complaint concerning these tactics and several employees had signed written complaints. Surely, such conduct cannot be equated to either the peaceful picketing in *Logan Valley* or the passing out of religious leaflets in *Marsh*.

CONCLUSION

Central respectfully submits that if the decision below is allowed to stand both *Logan Valley* and *Babcock* will take on a new scope which was never intended by this Court in either of those closely drawn decisions.

The *Logan Valley* aspect of First Amendment free speech, peaceful picketing in the quasi-public open expanse of a large shopping center will have been extended to a blitz-type union organizational campaign conducted on a single retail store's parking lot.

In like manner, the *Babcock* necessity of striking a balance between the union organizer's Sec. 7 rights to communicate his message against the storeowner's Fifth Amendment right to peacefully enjoy his property will be obviated in any instance where the storeowner's use of his land does not closely resemble the use in *Babcock*.

It is worthy to note that if the decision below is allowed to stand, Central and any other retailer in a similar position is wholly without recourse to protect its employees against harassing or coercive tactics by union organizers on the parking lots since Central endeavored to do so at the very outset of this case by filing a complaint with the Board. Not only was this complaint denied, but the signed petition of the many employees subjected to the harassment, intimidation and coercion, became the basis of the Board's findings against Central. At least as Central contends the law now stands, it was, and is, able to correct these abuses.

For the reasons stated herein, this Court is respectfully requested to reverse the Court of Appeals for the Eighth Circuit on the issues presented and to hold: